Asheville School, Incorporated *and* Carolyn Kelley. Case 11–CA–20447

August 8, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On July 8, 2005, Administrative Law Judge George Carson II issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified. [3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Asheville School Incorporated, Asheville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in Asheville, North Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2004."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 8, 2006

_____
Robert J. Battista, Chairman

_____
Wilma B. Liebman, Member

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Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and had ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] By order dated December 27, 2005, the Board denied the Respondent's Motion Requesting the Untimely filing of Respondent's Answering Brief (Member Schaumber concurring and Chairman Battista dissenting).

[2] In adopting the judge's finding that the Respondent's discharge of Charging Party Kelley did not violate Sec. 8 (a) (1), we find it unnecessary to pass on whether Kelley's conversations with other employees were concerted under Sec. 7. We find, however, in agreement with the judge, that under the circumstances presented here, Kelley's disclosure of confidential wage and salary information was not protected. In balancing the Respondent's interest in confidentiality with Kelley's interest in disclosure, we note that the record establishes that Kelley, as the Respondent's payroll accountant, possessed special custody of wage and salary personnel records on the Respondent's behalf, that the Respondent treated the information in these records as confidential, and that Kelley was aware that her established job duties, which she breached, required that she maintain the confidentiality of this information. See *Clinton Corn Processing Co.*, 253 NLRB 622, 623–625 (1980) (discharge of payroll clerk lawful where she disclosed confidential wage and salary information); see also *Cook County College Teachers Local 1600*, 331 NLRB 118, 120 (2000); *International Business Machines Corp.*, 265 NLRB 638 (1982). Although the Respondent maintained an unlawful policy prohibiting among employees the discussion of their own wages, the record fails to demonstrate a nexus between that prohibition and Kelley's disclosure of confidential information within her special custody. In these circumstances, we find that the Respondent's discharge of Kelley did not violate the Act.

[3] We shall modify paragraph 2(a) of the recommended Order to conform to our customary practice pertaining to the posting of the notice. We shall also substitute a new notice for that of the judge.

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain any prohibition upon your discussing your wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

ASHEVILLE SCHOOL INCORPORATED

Shannon R. Meares and *Lisa Shearin, Esqs.*, for the General Counsel.
George Ward Hendon and *Matthew S. Roberson, Esqs.*, for the Respondent.
Glen C. Shults Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Asheville, North Carolina, on May 16, 2005, pursuant to an amended complaint that issued on February 28, 2005.[1] The amended complaint, as further amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a rule prohibiting employees from discussing wages, threatening to terminate employees for discussing wages, and discharging Charging Party Carolyn Kelley for engaging in protected concerted activity. The Respondent denies all violations of the Act. I find that the maintenance of the rule did violate the Act. I find no evidence establishing an unlawful threat or that the termination of the Charging Party related to protected concerted activity and shall recommend that those allegations be dismissed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Asheville School, Incorporated (the School), is a North Carolina corporation engaged in the operation of an educational institution in Asheville, North Carolina. The School annually receives gross revenues in excess of one million dollars and purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of North Carolina. The School admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The School employs 85 individuals. Executives and faculty, a total of 61 employees, are salaried. The remaining 24 employees, including clerical, maintenance, and part-time employees, are paid hourly. Faculty members and executives are employed pursuant to individual annual contracts signed by the head of school and the employee. In years past, the document offering employment signed by the head of school and presented to the salaried employee for acceptance has contained the following sentence: "Your compensation is a matter of the strictest confidence and concern only to you and to me."

Glenn Mayes, assistant head of school for operations and chief financial officer, testified that, upon the advice of counsel, the School sent to all salaried personnel a letter deleting the foregoing sentence from their respective employment contracts. The letter deleting the sentence from Mayes' contract is dated May 2, 2005. Hourly employees do not have contracts, thus they have never been subject to the foregoing formal prohibition. Mayes acknowledged that, even though not subject to the foregoing formal prohibition, the School "had the expectation" that they would keep their wages confidential. Receptionist Carolyn (Charli) Cagle recalled that she was told this when she was hired. Mayes admitted that the rescission of the confidentiality requirement has not been communicated to hourly employees.

The Charging Party, Carolyn Kelley, began working at the School in June 1992, and worked there until March 15. She was the accountant and her duties included student accounts, loans, and payroll. She was the only employee who had access to the payroll information of each employee and was aware of, or could discover, the pay rate of each employee. Wage increases generally occurred annually, and Kelley received a hand-delivered document from Chief Financial Officer Mayes reflecting the amount of each employee's wage increase which she then entered into the payroll computer program. Her password was required to access that program which contained the wage rate of each employee. Mayes would use Kelley's password if for any reason he needed to access the payroll program. Kelley prepared the biweekly hourly payroll from timecards submitted to her by the hourly employees. The timecards reflected the regular and overtime hours worked by the employees. They did not contain the wage rate. Employees placed their timecards in a tray in Kelley's office labeled "payroll information." They remained there until Kelley tabulated them. As hereinafter discussed, Kelley divulged information relating to the manner in which one employee was being paid overtime and a wage increase given to a former executive. The complaint alleges, and the General Counsel and Respondent argue, that Kelley was terminated for engaging in protected concerted activity. The Respondent contends that she divulged confidential information of which she was aware by virtue of her position of accountant, that she did not engage in concerted activity, and that she was discharged for cause.

B. Facts

Carolyn Kelley worked in the school business office, a cluster of offices located behind the desk of receptionist Charli Cagle. Kelley shared an office with Janet Marshall who was responsible for accounts payable. Adjacent to their office was the office of Comptroller Helen Rouse, a salaried employee whose office was also adjacent to that of Chief Financial Offi-

[1] All dates are in 2004 unless otherwise indicated. The charge was filed on August 13, and was amended on November 22.

cer Mayes. The record does not reflect to whom Cagle reported. Marshall reported to Rouse. Accountant Kelley and Comptroller Rouse reported directly to Mayes.

In late December 2003 or early January 2004, Kelley spoke with Mayes regarding the overtime of Linda Alford, a part-time employee who worked as a research assistant. Alford's timecard claimed overtime for hours worked in excess of 24. Kelley testified that she asked Mayes whether Alford could be paid overtime "if she doesn't work over 40 hours," and that Mayes replied, "I can pay her anything I want to." Mayes recalls that he explained that the School had to pay overtime for hours in excess of 40, "but we could do it for anything under 40, and so we could make that arrangement" with Alford. The arrangement for Alford, as explained by Mayes at the hearing, occurred because Alford's supervisor needed her to work additional hours. Alford requested more compensation, but Chief Financial Officer Mayes wanted her base pay to be the same when she resumed her regular schedule. He investigated and found that, legally, the School could pay overtime for hours in excess of Alford's normal 24-hour schedule. Although Mayes explained the foregoing rationale underlying the payment of overtime to Alford at the hearing, he did not assert that he gave that full explanation to Kelley when she raised the question regarding Alford's overtime.

In late January, a few weeks after Kelley's conversation with Mayes, employee Janet Marshall recalls that Kelley stated Alford's name and complained to her that "if she [referring to Alford] worked more than 20, I think it was 20 hours that she was suppose[d] to work, if she worked more than that, that she was paid time and a half and that wasn't right." Marshall recalled that Kelley also informed her that she had told Mayes that she did not think that was right but Mayes said "that he could do whatever he wanted to do."

Kelley admits the substance of the foregoing conversation but denies stating Alford's name. She recalled that the conversation occurred when Marshall neglected to sign her timecard. Kelley gave her the card to sign and Marshall, while signing the card, stated that she thought it unfair that she lost overtime when inclement winter weather prevented her from getting to work. Kelley initially testified that she responded, "Well, if you think it's not fair, since we're griping, I think it's not fair for a part-time person to work 23 or 24 hours a week and get paid time and a half for any amount of overtime that they put on their card." She then elaborated, explaining that if the part-time person "worked 23 hours at a rate of $12 an hour and then they had 36 hours overtime, that they would be making more than I'm making and I'm a full time employee." The record does not reveal Alford's rate of pay, and Kelley denied that it actually was $12, explaining that she used that figure as a "for instance." On cross-examination, Kelley testified that she said, "Well, while we're griping, then I don't think it's fair that Linda Alford makes overtime when you and I work 40 hours a week." Immediately after giving the foregoing testimony, Kelley argued with counsel that he had put words in her mouth, that she did not mention Alford's name. I credit Marshall and Kelley's spontaneous testimony on cross-examination.

Kelley denied mentioning anything about Alford's overtime arrangement to receptionist Charli Cagle. Cagle disputes this, testifying to two occasions in which Kelley expressed that she though the overtime arrangement with Alford was unfair. She testified that, on one of the occasions, Kelley attempted to show her Alford's timecard saying, "Here, look at this." Cagle responded that she did not want to. Kelley then complained that Mayes had told her that "any arrangements between the School and the employee they could do." Whether the foregoing conversation, which Kelley denied, occurred is immaterial in view of her admitted conversation with Marshall.

On January 29, Head of School Archibald Montgomery held an employee meeting in which he announced that the School would be unable to give raises to its hourly employees. At a similar meeting several years ago, the former head of school, Billy Peebles, then referred to as the headmaster, had announced that no raises would be given to any employees. Afterwards, Accountant Kelley, in the course of her payroll duties, learned that Headmaster Peebles and his wife each received a pay increase. Mayes, in testimony, explained that, although the Board of Trustees had approved a raise for Headmaster Peebles and his wife, they had initially refused it. They accepted it in September of that prior year when enrollment figures exceeded projected goals. Only Kelley, Mayes, and the Board of Trustees had knowledge of that fact.

As the employees were leaving the January 29 meeting, Marshall, who had previously complained that she needed a raise and was aware that employee Charli Cagle had made a similar complaint, stated to Mayes, "Oh, so that means that we're not going to get a raise." Mayes answered, "This isn't pertaining to you and Charli. I have something else that I'm trying to work out for the two of you."

Shortly after the January 29 meeting, Carolyn Kelley spoke with Marshall, stating that there had been "a meeting like this once before" in which former Headmaster Peebles had announced that no one would get raises, but that, after that, "he gave himself a five percent increase and he gave that to his wife also." According to Marshall, Kelley cautioned Marshall, "Don't tell anybody, only Glenn [Mayes] and I know about it."

Kelley admits the substance of the foregoing conversation. She recalls telling Marshall "how much different the School is now than what it was when Mr. Peebles was the Headmaster." She acknowledged that she kept talking and informed Marshall that 1 year the employees did not get a raise but "the Trustees chose to give Mr. Peebles and his wife a raise." She denied cautioning Marshall not to mention this information. I credit Marshall.

The School first heard allegations that Kelley had divulged the foregoing information on March 5 when Marshall and Cagle spoke with Mayes regarding a different matter. Marshall and Cagle were accused by Kelley of somehow being responsible for the termination of her cousin by the contractor that provided food service to the School. They complained to Mayes about Kelley's accusation. The record is unclear regarding the basis for Kelley's accusation. Kelley was not recalled as a witness to deny that she made the accusation.

Marshall and Cagle met with Mayes and expressed their concern regarding what they deemed to be an unjust accusation. Mayes assured them that he was aware of the circumstances regarding the termination of the subcontractor's employee,

Kelley's cousin, and that they need not be concerned. Marshall "blurted out" that "quite frankly, I've had enough of Carolyn's [Kelley's] mouth." In the ensuing conversation, Marshall and Cagle informed Mayes of other statements made by Kelley including general references to the Alford and Peebles situations. Mayes requested that they give detailed written statements regarding any confidential information that Kelley had divulged, and they did so. Cagle's statement is dated March 5 and refers to "our conversation this morning." Marshall's statement is dated March 8.

Upon receipt of the statements from Cagle and Marshall, Mayes met with Head of School Archibald Montgomery. They decided to terminate Kelley because she had "shared confidential payroll information and had violated the trust of her position." Although the statements of Marshall and Cagle included references to other statements by Kelley, Mayes testified that the two specific grounds for the termination related to her divulging the overtime arrangement with Alford, paying overtime for hours worked in excess of 24, and the disclosure of the raise received by the former Headmaster. Mayes decided to wait until March 15 to terminate Kelley because the upcoming weekend of March 13 and 14 was parents weekend.

On March 15, at the end of the day, Mayes called Kelley to his office and informed her that she was terminated. He recalls being seated and referring to notes that reflect that he informed her that he was "saddened" to have to have the conversation but that he had statements from "colleagues" that she had shared payroll information with them and that this constituted a breach of trust and that she was terminated. Kelley recalled that Mayes was standing in front of his desk and began the meeting by stating "You're fired." She recalls asking what she was being fired for and that Mayes answered, "For disclosing confidential pay information with Janet Marshall." Kelley did not deny the accusation. She recalls answering, "If Janet [Marshall] said that, I said that." She then requested that Mayes not tell people that she was fired, that she would prefer it if he told people that she had retired.

The accountant duties formerly performed by Kelley were distributed between Comptroller Rouse and Marshall. Rouse assumed the payroll duties. Marshall, in addition to accounts receivable, began handling student accounts. Counsel for the General Counsel, when examining Mayes under Rule 611(c) of the Federal Rules of Evidence, assumed that Cagle had also taken over some of Kelley's duties and questioned Mayes as follows:

> Q. Now that Ms. Rouse, Ms. Marshall, and Ms. Cagle have assumed the duties associated with Mrs. Kelley's former position as accountant, you've talked to them about the importance of keeping information confidential?
>
> A. I have, yes.
>
> Q. And they've acknowledged the fact that they're suppose[d] to keep information confidential?
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> A. They have.
>
> Q. You've also warned them that sharing wage information is grounds for termination?
>
> A. Correct.

On direct examination, Kelley was asked, "Did you ever discuss confidentiality in your evaluation meetings?" Kelley answered, "No, I did not." On cross-examination Kelley was referred to her evaluation dated June 18, 2002, in which she had stated a concern that "staff members to be equal in opportunities and rewards." Counsel for the Respondent asked Kelley whether, in response to that concern, Mayes did not mention "the necessity of your confidentiality in not sharing the pay of others that you learned while you were payroll clerk." Kelley answered, "He did, but I have never given dollar amounts about anyone's pay. I have never revealed what anyone has made."

In an undated letter that she sent to Mayes following her termination, Kelley sets out various incidents involving other employees and states, "I just want you to know that I am not the only one who tells things they should not."

Kelley testified that she "never discussed what anyone made." When asked whether it "was okay to discuss the raises or the rates," Kelley answered, "Well, I think that anyone has . . . the right to gripe if they want to. . . . And that's what I was doing." At no time did Kelley assert that she sought to have Marshall, Cagle, or any other employee join her in protesting the manner in which Chief Financial Officer Mayes had determined to pay Alford. Neither Marshall nor Cagle testified to any such solicitation. Kelley was "griping" when she informed Marshall of the manner in which Alford was being paid.

Consistent with the absence of any claim by Kelley that she sought to have Marshall engage in any action with her regarding the manner in which the Respondent had decided to pay Alford, Mayes credibly testified that he was unaware "of any purpose or concert or activity of Mrs. Kelley . . . other than just griping" about the Alford overtime arrangement. She never reapproached him regarding his direction to pay Alford overtime for hours in excess of 24.

C. Analysis and Concluding Findings

The complaint alleges that the provision in the contract of all salaried employees providing that "[y]our compensation is a matter of the strictest confidence and concern only to you and to me" constituted maintenance and enforcement of a rule prohibiting employees from discussing wages. As held by the Board in *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), "promulgating and maintaining a rule prohibiting employees for discussing their salaries—an inherently concerted activity clearly protected by Section 7 of the Act"—violates Section 8(a)(1) of the Act. Although the Respondent has advised its salaried employees that the offending provision should be stricken from their current contracts and has represented that the prohibition no longer exists, the rescission of the prohibition has not been communicated to hourly employees. I find that the past maintenance of this confidentiality provision in the contracts of salaried employees and the unwritten expectation, verbally stated to Charli Cagle, that hourly employees would also keep their wage rate confidential violated the Act.

Counsel for the General Counsel moved to amend the complaint at the hearing following the examination of Mayes pursuant to Section 611(c) of the Federal Rules of Evidence to allege: On or about March or April 2004, Respondent warned employees that sharing wage information could result in termination. I initially reserved ruling upon the amendment and

questioned whether counsel had heard "something that I don't think I heard." To assure a full record, I later allowed the amendment. The transcript reflects that the amendment was proffered on the basis of Mayes' response to questions that related to his communications with current employees regarding their assumption of Kelley's former duties. Counsel did not change the context when she asked Mayes whether he warned them that "sharing wage information" would be grounds for termination. In context, Mayes' answer establishes that he warned the employees not to divulge wage information of which they became aware in the performance of Kelley's former job duties. The General Counsel's question named Cagle, Marshall, and Rouse as having assumed Kelley's former job duties, but the record does not establish that Cagle assumed any of Kelley's job duties. Although Cagle recalls that she was informed that her wage rate was confidential, she specifically denied that she was threatened in that regard at any time. Marshall testified that it was her understanding that payroll information is confidential, "not . . . like whether I talk about my pay, but talking about other people's pay to people that are not that person." Mayes cautioned the employees who were assuming Kelley's job duties not to divulge the information that they learned when performing those duties which, in addition to wage information, included student accounts and loans. The probative evidence does not establish that the Respondent threatened any employee with termination for "sharing wage information." I shall recommend that the amended allegation be dismissed.

The complaint alleges that the Respondent discharged Carolyn Kelley on March 15 because she engaged in protected concerted activity. Kelley's actions were neither protected nor concerted.

Kelley was not discharged for violating the Respondent's prohibition upon employees sharing their wage information. She did not discuss her own wages, a protected activity. She was discharged for divulging information relating to other employees of which she was aware by virtue of her position as accountant. The General Counsel argues that there is "no evidence that Respondent instructed Kelley to maintain the confidentiality of payroll" and, referring to Kelley's initial testimony, asserts that "she never received written or verbal instruction to keep wage information confidential." The foregoing argument omits Kelley's admission on cross-examination that Mayes informed her of "the necessity of . . . confidentiality in not sharing the pay of others" that she learned in her capacity as the accountant responsible for payroll. Kelley was aware that sharing the fact that the former headmaster and his wife had received raises when all other employees believed that no raises were being given was confidential. She told Marshall not to reveal that information. Although testifying that she never revealed an actual wage rate, Kelley cited a $12 an hour wage rate when disclosing that Alford was being paid overtime for hours worked in excess of 24. Accepting her assertion that the figure was a "for instance," there is no evidence that Marshall was aware of that fact. The $12 an hour base rate that Kelley stated was the predicate for her assertion that, with overtime, Alford could be earning more than she was. The disclosure of Alford's overtime arrangement related to Alford's pay. The General Counsel points out that timecards were maintained in a tray in Kelley's office until tabulated and were accessible to a curious employee. Thus, the General Counsel argues, an inquisitive employee could ascertain that Alford was claiming overtime for hours in excess of 24. The fact that an employee could have discovered that Alford was claiming overtime for hours in excess of 24 does not establish that the Respondent was paying her for that claimed overtime. The fact of payment was known only to Kelley, Mayes, Alford, and, presumably, Alford's supervisor. Kelley's posttermination statement that she was "not the only one who tells things they should not" confirms that she was aware that divulging information of which she was aware by virtue of her position as accountant was not proper. The Respondent considered the foregoing information to be confidential. Kelley knew it was confidential. Kelley's divulging confidential information was not protected. *Cook County College Teachers Union Local 1600*, 331 NLRB 118, 120 (2000).

Kelley did not seek to enlist the support of any other employee regarding any action relating to wages, hours, or working conditions. The General Counsel and Charging Party cite multiple cases holding that employee discussions regarding wages are protected insofar as such discussions can become the predicate for group action. Those cases are inapposite. Kelley had no agenda for group action. Unlike *L. G. Williams Oil Co.*, 285 NLRB 418 (1987), cited by the General Counsel, Kelley was aware that the information she was divulging was confidential. Unlike the discriminatee in *L. G. Williams Oil Co.*, Kelley did not "pursue her protest . . . as a matter of principle . . . ." Id. at 423. The assertions in the briefs of the General Counsel and the Charging Party that Kelley's conversations were a predicate for group action are belied by Kelley's admission that she believed that she had the right to gripe and "[t]hat's what I was doing." She did not approach management on behalf of herself or any other employees with regard to the manner in which Alford was being paid. Confirmation that Kelley was just "griping" is established by her testimony that she did this on one occasion when speaking with Marshall. She did not state that she intended to take any action, nor did she suggest or request that Marshall to do anything. According to her testimony, she griped about it on that one occasion. Whether she also twice mentioned Alford's overtime arrangement to Charli Cagle is immaterial since she denies doing so and does not claim to have solicited Cagle to engage in any concerted action.

In *Diva, Ltd.*, 325 NLRB 822 (1998), the Board adopted the decision of the administrative law judge in which the judge set out the following summary of precedent:

> Since Meyers [*Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986),] the Board has found an individual employee's activities to be concerted when they grew out of prior group activity; when the employee acts, formally or informally, on behalf of the group; or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. However, the Board has long held that, for conversations between employees to be found protected

> concerted activity, they must look toward group action and that mere "griping" is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964), and its progeny. Id at 830. [Footnotes omitted.]

Kelley was not looking toward group action. She divulged the raises of the former headmaster and his wife when reminiscing about "how much different the School is now than what it was when Mr. Peebles was the Headmaster." She divulged the manner in which the Respondent was paying Alford for overtime and stating a wage rate that so far as Marshall knew was Alford's actual rate, with the predicate, "as long as we're griping." There is no evidence that Kelley was "look[ing] toward group action" or seeking to act in concert with any other employees relating to any term or condition of employment. The Respondent was unaware "of any purpose or concert or activity of Mrs. Kelley" other than "griping."

I am mindful, as noted in the briefs of the General Counsel and Charging Party that Kelley was a long-term employee with no prior discipline. Although the summary discharge of this long-term employee was harsh, she admitted divulging information that she was aware the Respondent considered to be confidential. The Respondent chose to discharge her for her indiscreet disclosures of confidential information rather than impose a less severe punishment. There is no evidence that the Respondent's action was motivated by any reason other than her breach of trust in disclosing confidential information. Kelley admitted the conduct upon which the Respondent based its action at the hearing and, at the time of her termination, she acknowledged, "If Janet [Marshall] said that, I said that." Kelley did not seek to have any employees join with her in any concerted action. She never reapproached Mayes regarding Alford's overtime arrangement. She simply griped about it. There is no evidence that the activity in which Kelley engaged was concerted, nor is there any evidence that the Respondent believed, or had any reason to believe, that she was engaged in concerted activity. I shall recommend that the allegation that Kelley was discharged for engaging in protected concerted activity be dismissed.

CONCLUSIONS OF LAW

By promulgating and maintaining a prohibition upon discussion among employees of their wages, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent promulgated and maintained a prohibition upon discussion among employees of their wages, I find that it must be ordered to cease and desist and post an appropriate notice. Because the formal statement of that prohibition in the contracts of salaried employees has been rescinded, an affirmative order is unnecessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Asheville School, Incorporated, Asheville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a prohibition upon discussion among employees of their wages.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility at Asheville, North Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 8, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain any prohibition upon your discussing your wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ASHEVILLE SCHOOL, INCORPORATED